United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74 -1807

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

INSURANCE COMPANY OF NORTH AMERICA,
Plaintiff-Appellee

v.

GELB BROS. & ZUCKERMAN, INC.,
JAMES J. JOWDY, JACQUELINE JOWDY,
EDWARD J. JOWDY, and JOAN JOWDY,
Defendants-Appellants

On Appeal From a Decision of the United States District Court, District of Connecticut

---

BRIEF OF APPELLANT

NORRIS L. O'NEILL
99 Pratt Street
Hartford, Connecticut

MARK ASMAR
One Constitution Plaza
Hartford, Connecticut

LEGGO PRESS, PRINTERS, HARTFORD

TABLE OF CONTENTS

CASES, STATUTES, RULES AND AUTHORITIES

CASES: *Page*

RULES:

STATUTES:

AUTHORITIES:

ISSUES

I. Can a court consider the facts alleged in a supplemental affidavit produced for the first time at a hearing on a Motion for Summary Judgment?

II. Where an opposing party has no opportunity to respond to a supplemental affidavit before judgment, has said party had due process?

III. Where a clear factual issue appears in the movant's own affidavits and pleadings, can a court grant summary judgment?

FACTS

A. RE SUMMARY JUDGMENT

On July 27, 1973, the Plaintiff filed a complaint against the Defendant GELB BROS. & ZUCKERMAN (hereinafter Gelb) on a surety bond, and against the individual Defendants (hereinafter Jowdys) on a claimed indemnity agreement.

Thereafter, the Defendants appeared.

On November 15, 1973, Plaintiff filed a Motion for Summary Judgment with a supporting affidavit.

On November 29, 1973, the Defendants filed a Brief in opposition to Plaintiff's motion.

On December 3, 1973, the motion came on for hearing and was by agreement of counsel submitted to the court without oral argument; and it came on for further hearing on February 4, 1974.

On or about January 14, 1974, the Plaintiff filed its proposed findings, conclusions, and judgment.

On January 30, 1974, the Defendants filed their proposed findings and conclusions.

On February 4, 1974, a new hearing was held "on proposed finding of fact and conclusions of law."

At that hearing a supplemental affidavit supporting the Motion for Summary Judgment was filed by Plaintiff and seen for the first time by the Defendants. (Appendix 13, 14).

Thereafter, the court entered judgment for the Plaintiff on March 3, 1974.

FACTS

B. RE CASE IN CHIEF

The facts of the case itself are as follows:

In June of 1970, the Defendant Gelb was engaged in the business of a cigarette distributor in the states of New York and Connecticut. In accordance with Connecticut law, Gelb applied to the State of Connecticut Tax Commissioner for a license to engage in such business, and for a permit to buy stamps on credit.

Gelb was required to post a $100,000 bond, and the Insurance Company of North America (hereinafter I.N.A.) became surety on that bond. That bond was executed June 26, 1970. Thereafter, on July 1, 1970, the individual Defendants, JAMES J. JOWDY, JACQUELINE JOWDY, EDWARD J. JOWDY, and JOAN JOWDY, executed and delivered to I.N.A. indemnity agreements with regard to bonds executed after the July 1, 1970 agreements were signed.

The Defendant Gelb owes $82,803.22 on said bond to the State of Connecticut.

ARGUMENT

I. Can a Court consider facts alleged in a supplemental affidavit produced for the first time at a hearing on a Motion for Summary Judgment?

The purpose of affidavits in support of a Motion for Summary Judgment is to set forth facts that, if not disputed, can support a finding that there is no genuine issue of fact. It follows that the attorney for the opposing party is expected to examine the affidavits submitted in support of the motion, consult with his client, and, if appropriate, file counter

affidavits. But, although he has a right to controvert any affidavit filed, he is not allowed to make factual assertions in oral argument, as his recourse is to file counter affidavits. *DeVoto* v. *Pacific Fidelity Life Insurance Co.*, (1973, D.C. Cal.) 354 F.Supp. 874.

In the instant case, Defendants' attorney was in court without his clients, the Motion was called, and argument had begun. Then, for the first time, did Plaintiff's attorney tender to Defendants' attorney this document of some twenty-five pages, entitled "Supplemental Affidavit Supporting Motion for Summary Judgment."

Counsel for the movant had not called, written, or in any way prepared his brother attorney for the fact that he planned to submit this supplemental matter.

The Defendants claim a genuine factual defense. If permitted, the Defendants will produce affidavits alleging facts counter to Plaintiff's affidavit.

As a matter of fundamental fairness, the Defendants should not be prevented from having their day in court when they have a true defense.

The rules themselves prohibit the idea of such surprise. An opposing party is specifically forbidden from doing what Plaintiff's attorney did here. "The adverse party *prior to the day of the hearing* may serve opposing affidavits." Rule 56(c). (Emphasis added).

Although, in the long run, the court will not prefer one party over another, in summary judgment hearings, the courts have held that, if a summary judgment is not clearly warranted, it cannot be granted, *U.S.* v. *Bazell*, (CA.7) 194 F.2d 745; that the burden is on the movant, *Pennsylvania* v. *Curtiss Nat. Bank of Miami Springs*, (CA.5) 427 F.2d 395; and that they are quite critical of movant's papers but not

of the opposing parties, *Witlen* v. *Giacalone,* 154 F.2d 20. Therefore, if the opposing party is preferred, he certainly should have at least an opportunity equal to the movant to see the affidavit before the hearing. Rule 56(c).

It is said that an affidavit is the weakest form of evidence to use in such a proceeding. *Bergeron* v. *State Farm Mutual Automobile Insurance Co.,* 198 F.Supp. 723 (E.D. La. 1961).

This is so because it is not subject to cross-examination, the witness is not present to be observed, and the preparation of the document cannot be probed. To add to those deficits of such evidence, the surprise presentation of the material is unfair on its face.

At the very least, the adverse party always has the right to examine into the affidavits. *Toebelman* v. *Missouri-Kansas Pipe Line Co.,* (D.C. Del.) 41 F.Supp. 334.

As just one example, there was no adequate method by which counsel could, in open court, examine this 25-page document to determine if it was all on the affiant's own personal knowledge. *Washington* v. *Maricopa County,* (CCA 9) 143 F.2d 871.

II. Where an opposing party has no opportunity to respond to a supplemental affidavit before judgment, has said party had due process?

The right to have the facts tried by a jury in a federal suit is granted by the United States Constitution, Amendment VI. Only in those cases where there is no fact in the case that is in dispute can a court by-pass the jury and decide the case, because the reason for the right does not exist. *Sartor* v. *Arkansas Natural Gas Corp.,* 321 U.S. 630 (1944).

Where a party is going to file supporting affidavits, they must be served under Rule 6(d) *Canning* v. *Star Publishing,* (D.C. Del.) 19 Fed. R. Dec. 281.

Rule 6(d) provides that affidavits in support of a motion shall be served with the motion, and that opposing affidavits may be served not later than one day before the hearing. In regard to the opposing affidavits, the court may allow them to be served "at some other time."

An affidavit filed in opposition to a Motion for Summary Judgment on the day of the hearing is inadmissible under Rule 56 even though the court might allow extra time under Rule 6. *Beaufort Concrete Co.* v. *Atlantic States Construction Co.*, (C.A.5) 352 F.2d 460.

In our case, the complaint never mentions any oral agreement (Counts III and IV). The original affidavit never mentions any oral agreement. On February 4, 197[illegible] when Defendants' attorney walked into the courtroom, the case against Jowdys was solely based on the indemnity agreements themselves (see Counts III and IV, paragraphs 2 and 3 of each, and affidavits of Donald W. Stewart, paragraphs 8 and 9).

Even in Plaintiff's *"Statement of Material Facts Pursuant to Rule 10(a)3, Local Rules of Civil Procedure"*, in paragraphs 11 and 12, the claim is not on any oral agreement but still on the indemnity paper of July 1, 1974, itself.

As the attorney for Defendants said at the February hearing, "Our position is basically we are sued — until this morning we were being sued on a basis of an indemnity agreement and bond issued in 1970. We had no knowledge of the supplemental affidavit until now." (Appendix 13)

Certainly, had Defendants had any awareness that the idea of an oral agreement was going to be read into this complaint, Defendants would have requested permission to file an answer under Rule 6. Surely, the court would consider that request. *Scarlatos* v. *Kulukundis*, (DC-NY) 21 Fed. R.

Dec. 50. At the very least, the court should not use that material in its finding and judgment.

All of the rules point to some prior notification. (Rule 6, Rule 56, Rule 59, etc.) *Moore's Federal Practice* at page 2816 speaks of the same idea of notice in regard to the documents accompanying an affidavit.

Where the rules themselves forbid filing of surprise affidavits; where a party is in fact surprised where the court uses the surprise material in its decision, the surprised party has clearly been denied due process because he never received a hearing on the issues raised.

III. Where a clear factual issue appears in the movant's own affidavits and pleadings, can a court grant summary judgment?

The Plaintiff in this action has alleged that the individual Defendants are liable on an indemnity agreement dated July 1, 1970, that specifically calls for liability in regard to future contracts. Plaintiff claims that this agreement imposes liability for a contract dated June 26, 1970. On its face, this is not so. The Plaintiff's attorney says that the bond itself was signed in Plaintiff's office on June 26, 1970 (Appendix 13).

The original affidavit filed by Plaintiff referred only to the documents. Defendants believed then, and believe now, that such affidavits would not justify a judgment because of the clear showing of the dates on the documents themselves.

Thereafter, at the hearing, Plaintiff produced a new "Supplemental Affidavit" in which Plaintiff's employee (one Joseph A. Newcomb) alleges that some oral statements of indemnity were given. (See page 4 of Supplemental Affidavit.)

Defendants flatly deny making such statement, and, if permitted, will file affidavits to that effect.

The judgment of the court is predicated on the assertions of an oral agreement. The Statute of Frauds makes such an oral promise invalid, Connecticut General Statutes, Section 550 (Revision of 1958) but more important, Defendants deny its having been made; seek to cross-examine the affiant; and testify themselves on that issue.

The court found in its Findings of Fact, Paragraphs 7, 8, and 9, that the Jowdys made oral promises of indemnity in regard to a 1969 Tax Bond. No such allegation of an oral promise appears in the complaint. No date of the making of such oral promise appears in the court's findings.

The court found in its Finding of Fact, Paragraphs 12, 22, 23, 24, and 25, that the Jowdys made oral promises of indemnity in regard to the 1970 Tax Bond. No such allegation of an oral promise appears in the complaint.

The court specifically found "under the totality of the circumstances surrounding the execution of the Connecticut tax credit bond dated, signed, and sealed on June 26, 1970, at the Plaintiff's Hartford office, was intended by all parties to become effective July 1, 1970. It was intended by the parties to be secured by the indemnity agreement signed on July 1, 1970 . . . ."

Thus, the court was using the material from the Supplemental Affidavit which Defendants had no chance to deny in reaching its decision. This is totally unfair. Defendants do deny those facts and the conclusion.

The court, in its conclusions, Paragraphs 13 and 14, pierces the corporate veil and states that the Corporation was a "mere instrumentality of two individuals". This issue was never raised in the complaint, and Defendants had no

chance at any time to rebut the facts (if any) on which this conclusion might rest. Defendants deny such conclusion.

The court further concludes that Defendants admit the facts pleaded in the complaint because they filed no answer. Defendants do not admit all said facts.

The facts of the complaint are not to be used in a Summary Judgment hearing except to determine if there is a genuine issue of fact. *Love* v. *United States Rubber Co.*, (D.C. Pa.) 92 F.Supp. 174; *Hunter* v. *Mitchell*, 86 App. D.C. 121, 180 F.2d 763.

The reason the court held a second hearing on the Summary Judgment motion was that the court had "some questions in my mind," after reading the first affidavit. (Appendix 14) If the case is not clear, judgment should not be granted. Where a Summary Judgment is not clearly warranted because a defense exists, it cannot be granted even though the opposing attorney does not file all the proper pleadings. *United States* v. *Bazell*, (supra).

An adverse party is not even required to file counter affidavits to avoid a summary judgment. *Lundeen* v. *Cordner*, (CA 8) 356 F.2d 169. *Federal Summary Judgment Practice*, 41 Conn. Bar Journal 47, 54.

CONCLUSION

The basic rule is that, if there is the slightest doubt as to the facts, summary judgment will be denied. *Doehler Metal Furniture Co.* v. *United States*, 149 F.2d 130 (2d CCA 1945). Having that in mind, together with the clear statements in movant's complaint and affidavit, certainly doubt exists.

However, when we add to this doubt the fact that Defendants would have filed an affidavit in response to Plain-

tiff's Supplemental Affidavit, and did not have a fair chance to present their facts, a reversal of the District Court's decision is clearly called for.

It is clear that summary judgment should be denied in any case where a study of the record shows that inferences contrary to those drawn by the trial court might be permissible and thus raise a genuine issue. *United States* v. *Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed 2d 176.

The documents and the dates themselves permit such contrary inferences.

The parties were led to believe that the final hearing of February 4, 1974, was to be in regard to the material in the Finding of Fact and Conclusion of Law (see Docket Sheet "2-4 HEARING on proposed finding of fact & conclusions of law. DEC. RESERVES Supplemental affidavit supporting Motion for Summary Judgment findings of Fact and Conclusions of Law filed by Pltf. (sic.))"

On the other hand, the court treated the matter as a "further hearing" of the original summary judgment hearing (P. 2 of Court's Finding of Fact and Conclusions of Law).

This was an additional surprise to Defendants' attorney.

Where a hearing is not conducted as the parties have been led to expect, the judgment should be vacated so that both parties have a real opportunity for full hearing on the merits after proper notice. *Williams* v. *Howard Johnson's, Inc. of Washington,* (CA 4) 323 F.2d 102.

The burden is on the moving party to clearly establish that there is no genuine issue of fact, and the party opposing the motion must be given the benefit of every reasonable inference that can be made in his favor. *Pennsylvania* v. *Curtiss Nat. Bank of Miami Springs,* (supra).

As the court said itself, no one knew the facts of what the date of filing of the bond was. The court inquired of both attorneys as to that date, and said, "Wouldn't that be wise to have that on file gentlemen?" (Appendix 13) This pertinent fact was not presented by the movant. A reasonable inference in regard to a bond dated June 26, 1970, was that it was filed June 26, 1970. If so, the indemnity agreement of July 1, 1970, would not apply to that bond.

Thus the decision of the District Court below should be reversed and the case returned for further proceeding in which Defendants have an opportunity to present their version of the facts.

Respectfully submitted,

NORRIS L. O'NEILL
Attorney for Defendants

INDEX TO APPENDIX

APPENDIX

MR. BEASLEY: "And in reliance upon that oral agreement to write the bond, or on their personal indemnity, I.N.A. caused the bond to be executed — not executed, but signed — in its office on June 26th." (Transcript page 8)

* * *

MR. ASMAR: "Our position is basically we are sued — until this morning we were being sued on a basis of an indemnity agreement and bond issued in 1970. We had no knowledge of the supplemental affidavit until now." (Transcript page 16)

* * *

THE COURT: When did the stamp on the Tax Commissioner's official records indicate that it was received at his office?

MR. ASMAR: We don't have a copy of it, your honor.

THE COURT: Wouldn't that be wise, to have that on file, gentlemen?

MR. BEASLEY: Yes, your Honor. The bond annexed to the affidavit is Exhibit E. That came from the Tax Commissioner's office.

THE COURT: Now, is there a stamp?

MR. BEASLEY: There is no stamp on it.

MR. ASMAR: There is no stamp on it, your Honor.

THE COURT: Don't they usually put it through a time clock?

MR. BEASLEY: No. Well, I don't know. I just know that there is none on that. (Transcript page 27)

* * *

THE COURT: The reason I thought it best to put this down on the calendar is because, in receiving the file on the question of summary judgment, in respect to the proposed findings of fact and conclusions of law, it came to the attention of the Court, the specific issue, as to whether or not the indemnity agreement, which contained a provision to the effect that the covered bonds, hereinafter issued, whether it included the specific bond or bonds which are the subject of this litigation.

And apparently that was brought out in adversary counsel's brief or memorandum.

I would like to hear a little further about that. It raised some questions in my mind. Mr. Beasley, what is your position on that particular issue? What do you say concerning that alleged finding, that relates to the subject matter.

* * *

THE COURT: Was this the first bond relationship between the parties?

MR. BEASLEY: No, it was not.

THE COURT: Or was this a continuing relationship? (Transcript page 2)

MR. BEASLEY: It was a continuing relationship, your Honor. And in order to make this abundantly clear, I have obtained a supplemental affidavit, which sets this out. And I did not have time to get it down here before.

THE COURT: Well, in a nutshell — if you have an extra copy for the law clerk, I am sure he would be pleased to review it.

MR. BEASLEY: I do have. . . . And I will certainly give Mr. Asmar a copy of it. (Transcript page 3)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

INSURANCE COMPANY OF NORTH AMERICA, Plaintiff-Appellee	)	
v.	)	
GELB BROS. & ZUCKERMAN, INC., JAMES J. JOWDY, JACQUELINE JOWDY, EDWARD J. JOWDY, and JOAN JOWDY, Defendants-Appellants	)	CIVIL ACTION FILE No. 74-1807
	)	September 5, 1974

CERTIFICATE OF SERVICE

I hereby certify that, on September 5, 1974, I served three copies of the enclosed Brief of Appellant by mailing them to Elmer W. Beasley, Esq., 900 Asylum Avenue, Hartford, Connecticut, 06105, and three copies to Mark A. Asmar, Esq., One Constitution Plaza, Hartford, Connecticut 06103.

Norris L. O'Neill
Attorney for Appellants
99 Pratt Street
Hartford, Connecticut 06103